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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY
(a corporation),
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD. (a corporation) and ROBERT NETTLEFOLD,
Appellees.

BRIEF FOR APPELLANT.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellant.

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I. Statement of the Case.

1. On February 25, 1916, libelant and respondent entered into the following agreement:

"San Francisco, February 25th, 1916.
Ford Motor Company,
San Francisco, Cal.
Gentlemen:
Attention Mr. L. C. Davis.
We confirm freighting engagement as follows:

Commodity: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

Rate: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and /or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

Shipment: Per American S. S. 'Cacique' June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

Delivery: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3000 per day.

Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

Yours very truly,
W. R. Grace & Co.
(Sgd.) H. E. Moore,
Traffic Manager.

Accepted:
(Sgd.) Ford Motor Co. of Canada, Ltd.
By L. C. Davis."

(Exhibit "A", *46)

On March 2d, respondent wired to its agent at San Francisco:

"Understand you have arranged 6200 tons, our understanding this is the only contract you have arranged, and this is all we will need to end of July." (269)

* Figures in parenthesis refer to pages of apostles.

On March 3d, respondent wired to its agent at San Francisco:

> "Understand you have engagement by steamer named Cacique. We are also informed you have engaged 6200 tons. We need only about 6000 tons in addition to what we arranged, and would like this for June-July sailing; advise." (270)

2. Libelant was at all times willing and eager to carry out the contract. Respondent, on the other hand, decided shortly after making this contract that it was unprofitable, and exhibited many symptoms of a desire to extricate itself from its obligations on divers grounds. Eventually, and shortly before performance on the part of respondent became due, the Southern Pacific Company, which held that portion of the Cacique consignment which respondent chose to offer, was instructed by respondent to "not, under any circumstances, deliver any of the cargo at present on hand booked steamer Cacique to W. R. Grace & Co." (304, 305)

On March 28th, respondent wired to its San Francisco agent:

> "You state 6200 tons. We will be able to give 4284 tons * * * " (272)

On the same day respondent wrote to its San Francisco agent:

> "That we do not need the 6200 tons, is due to the fact that we have succeeded in obtaining two steamers from the New Zealand Shipping Company, one sailing out of St. John on the 20th of April and one sailing out of Montreal

on the 20th of May, taking a considerable number of cars which otherwise would have had to go by Steamer Cacique * * * " (316)

On March 29th, the San Francisco agent wired to respondent:

"Steamer Cacique goes Wellington Sydney only; see contract; you should arrange 6200 tons accordingly." (316)

There was a misunderstanding between respondent and the San Francisco agent who, in a letter to respondent, dated April 3, 1916, says, among other things:

"We have your letter of the 30th in which you advise you had not received contract which we executed with Grace & Co. for 6200 tons per their steamer Cacique for June sailing, and to say that we were surprised at your letter is expressing it mildly. * * *

* * * The contract has been entirely arranged for, and we wired you today we are compromised for 6200 tons and will be obliged to pay dead-freight for any unshipped portion * * * We trust that nothing will stand in the way of your fulfilling same and supplying the steamer Cacique with the tonnage as originally contracted for." (272, 273, 274)

On the same date the San Francisco agent for respondent wrote to its principal:

"With considerable surprise note that you will only have 4284 tons for the contract which we signed to cover 6200 tons. At the time of writing this letter, we have not taken this matter up with the W. R. Grace Company, but we feel that when it is taken up with them they will desire to cancel our contract entirely." (274)

On the same date said agent wired to respondent:

> "We are definitely compromised for 6200 tons for this vessel otherwise dead freight will be payable on any unshipped quantity. (275)

Answering the last wire, respondent wrote to its agent (April 4, 1916):

> "We are sorry that we did not know the existence of this contract * * * Had we had it, we would not have made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of $35.00 per ton. We did not know that your booking with the Grace Company was firm for this whole amount, and took up the balance of the 6200 tons over and above 4284 tons of which we advised you we had present specifications for, by this New Zealand steamer.
>
> However, we expect certain additions from Australia, which will no doubt bring our specifications up to the required amount." (276)

In a letter, in answer to the last letter, the agent wrote, on April 10, 1916:

> "Our correspondence prior to the mailing of the contract referred to 6200 tons, and we had never at any time specified any smaller amount for this boat, and we, of course, thought the matter was thoroughly understood by you.
>
> We hope that you will be able to supply the tonnage as W. R. Grace & Company have contract for more tonnage for this boat and as you know, it must go down there and return empty, and as they have arranged their schedule you realize the importance of our fulfilling our contract. If you think you will not be able to supply this cargo, kindly let us know imme-

diately or as soon as practicable in order that we may take the necessary steps to secure tonnage at this end." (277)

In another letter of the same date (April 10th), the agent wrote to his principal:

"Of course, at this time it is too late for W. R. Grace & Company to withdraw as they have signed up sufficient cargo in addition to our 6200 tons that at the present time it is impossible for them to withdraw their ship." (278)

On April 19, 1916, respondent wrote to its San Francisco agent as follows:

"We understand that we are supposed to have 6200 tons on this steamer * * * Actually we have cars for only 4572 tons * * * *We engaged space for certain cars by the S. S. 'Whakatane' and 'Paheka' of the New Zealand Shipping Company, which otherwise would have gone on the S. S. 'Cacique.'*. There will be about 1628 tons space which we will be unable to use." (278, 279)

On May 1st, respondent wired to the San Francisco agent:

"We start Cacique contract today—writing full particulars as to quantity ports and dates of shipment 1316 cars in all." (315)

On May 2nd, the San Francisco agent wired to respondent:

"Your wire today Cacique contract still 540 tons short—can you complete it—otherwise we must secure other cargo at probable loss." (315)

On May 4th, respondent wrote to its San Francisco agent:

> "We have intimated to you that *we cannot take the whole amount of the cargo on the Cacique.*" (280)

On May 5th, the San Francisco agent made an agreement with Henry W. Peabody & Company, on behalf of respondent, which

> "covers 542 measurement tons of 40 cubic feet each per W. R. Grace & Company's S. S. Cacique, *loading at San Francisco about July 1st* for Sydney & Wellington." (313, 314)

On May 6th, respondent wrote to its San Francisco agent:

> "In order *as far as possible* to *approximately* fill our reservation by this boat it will be necessary for us to turn down extremely favorable rates out of the Port of New York. We wish you would let Grace & Company know this. We enclose copy of wire received from our New York Foreign Department in which they quote us a firm rate of $40.00 out of New York. You will understand how extremely favorable this rate is when we have so much less inland freight to pay." (315)

On May 11, 1916, respondent wrote to its San Francisco agent:

> "We are enclosing herewith our May schedule showing the number of cars which will be shipped from the factory each day for the steamer Cacique. This will amount to 1288 cars. We advised you sometime ago that *we would have 1316 cars for the Cacique; but we find it impossible to ship this number on account of new method of crating.*" (282, 283)

In a letter from the San Francisco agent of respondent to its principal, dated May 12, 1916, the agent shows that

> "We are still shy a cargo for this ship" and requests "that you advise us as soon as possible just what tonnage you will use * * * so that Grace & Company will be able to tell just about how much freight will be left at Sydney and how much at Wellington in order to enable them to properly stow other cargo." (283, 284)

(Under the contract it was the duty of respondent to make these declarations before March 5, 1916; this duty remained un-preformed on May 11, 1916.)

On May 12, 1916, the San Francisco agent of respondent wrote again to its principal:

> "Please let us know as soon as possible as far as you can the total amount of tonnage for this boat, also just how much will be discharged at Sydney and Wellington." (285)

On May 15th, the San Francisco agent wired to respondent:

> "Please wire without fail Tuesday morning total cubic measurement shipments for Cacique for Wellington and Sydney. Grace & Company must have this information immediately to figure steamers stowage and cargo requirements." (313)

On May 16th, respondent answers:

> "Total cubic measurement on shipments for Cacique for Sydney 761 tons, Wellington 1190 tons, other ports 2017 tons, four carloads of parts 116 tons—total 4084 tons." (312)

On same day libelant wired to respondent:

> "Your wire gives total 4086 tons. Must have full quantity 6200 tons covered your freighting contract February 25th or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo." (130)

On May 18th, the San Francisco agent wired to respondent:

> "Your wire May 5th indicates 5087 tons total for Cacique May 16th you advise total 4084 tons Wire immediately exact Cacique tonnage in order we can contract for unused space. Probability unable secure rate 47.50 Unless we can complete cargo we will have severe loss. Please advise definitely." (312)

On May 19th, the San Francisco agent wired to respondent:

> "Please reply our wire 17th regarding total tonnage for Cacique Must know how much space to fill." (312)

On the same day respondent answered by wire:

> "Advise Grace Sydney 762 tons Wellington 1188 tons. Stop. Will likely give about another 1000 tons for Melbourne making 5075 tons shipped from here having a shortage of about 600 tons * * *" (311, 312)

On May 20th respondent wrote to its San Francisco agent:

> "We have written you a concurrent letter indicating the fact that there has been a misunderstanding in connection with the space on the 'Cacique'. We had not assumed that we were going to be held for 6200 tons space." (285, 286)

On May 22nd respondent wired to its San Francisco agent:

> *"Cannot give you balance of contract in July not likely until August and following months* * * * In view of Union being behind on its schedule would it not be possible to transfer these cars to Cacique and replace to Union later on in year?" (311)

On May 23rd respondent wired to San Francisco agent:

> "Do everything possible to sublet Cacique 1500 tons if cannot borrow from Union, as it looks as if we cannot get out the 1000 tons additional of which we advised yesterday." (311)

On May 25th libelant wrote to respondent:

> "Although a week has elapsed, we are without reply to our telegram to you May 18th * * * We confirm, as stated in our wire above, that we must have the full quantity of cargo which you have contracted to deliver to us for S. S. Cacique for Wellington and Sydney, that is, 6200 tons of 40 cubic feet each, or in lieu of this amount of cargo the payment of dead freight on any portion of the contract not shipped. The time is too short to enable us to secure other cargo." (130, 131)

On May 25th respondent wired to San Francisco agent:

> "Deny we are offering space New York except for August sailing." (311)

On the same day respondent wrote to San Francisco agent:

> "For a considerable length of time we did not know what if any arrangements you had

made with the owners of the 'Cacique'. During this period we entered into negotiations for the forwarding of cargoes on the steamship 'Whakatane' and 'Pakeha'. We would not have accepted these arrangements, had we known your arrangements were completed * * *'' (287, 288)

"Even at that time we had sufficient tonnage to make up this full cargo. We had warned the factory to make their experiments conclusive at the outset in the knocked down method of shipment. We had warned them that *cutting down the space on the knocked down shipments during the progress of the filling of any contract would materially alter our calculations.* They, however, went forward with these experiments *and we really did not appreciate the extent of the saving until we came to tote up the amount of space which we still had to fill on the steamer Cacique* * * * However, if we are in for it for this 1500 odd tons' space which, notwithstanding the Peabody contract which we figure we still have to take care of upon the steamer 'Cacique', we want you to use every means in your power to sub-let this space.'' (288, 289)

On May 26th, respondent wired to San Francisco agent:

"Cacique total cargo from factory will be 4075 tons.'' (311)

On May 27th, the San Francisco agent wrote to respondent:

"With regard to space on the 'Cacique' which you will not be able to fill and for which we are obligated, we have been doing our utmost to secure tonnage at $47.50.'' (292)

On May 31st, the San Francisco agent wired to respondent:

> "Union Company say all cars at present here will leave by Coolgardie June 1st., Waimarino or Floridian end of June. *Any cars here after July 1st they will give to Grace.* * * *" (293, 294)

On the same day respondent wrote to its San Francisco agent:

> "It is a further surprise to us to note that up until Saturday last, we were still led to believe that the 'Cacique' would sail on the 14th of June. This was the latest information from you. We had to do considerable wiring to get any *different information* * * * This information relayed to Australia some time ago would have allayed a considerable *fear on their part that shipments would arrive piling up one on the other causing congestions to a considerable degree.*" (294, 295)

(Showing that the three shipments on the steamers of the Union Steamship Company, during June, caused a congestion of cars in Australia, and that a *late* arrival of the Cacique at San Francisco was the desire and hope of respondent and its San Francisco agent. This is confirmed by the next letter:)

On June 1st, the San Francisco agent wrote to respondent:

> "They (Union Steamship Company) are willing to allow us to have any cars which might arrive later than July 1st or after the 'Floridian' or 'Waimarino' sail which we can turn to Grace & Company for the Cacique." (297)

On June 1st, Union Steamship Company wired to respondent:

> "We cannot give any of these cars to Grace Company, but we are willing to give Grace portion of our consignment which has not reached us yet, provided you replace the quantity we let go." (298)

On June 1st, respondent had more tonnage engaged than it could use.

On June 1st, respondent wrote to libelant, answering the letter of May 25th, and giving the tonnage for the Cacique by ports, making a total tonnage of 4075 tons, saying:

> "In addition we have effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the coast originally contemplated to go forward by Union Steamships. We understand that you have let 524 tons additional, making 6099 tons all told of the 6200 tons allotted to us.
>
> This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf, has not been carried out by yourselves, in that, such an engagement calls for June loading, which in the parlance must necessarily mean June shipping, whereas we understand the Steamer Cacique will not leave until about the 10th of July. * * *
>
> We wish it, therefore, definitely understood that if by reason of the above and other circumstances, our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding." (48, 49)

This letter was received by libelant on June 5th. (131)

On June 3rd, respondent wrote to its San Francisco agent:

> "We are sending you under separate registered mail today three copies of all invoices covering autos and parts and two copies of all bills of lading covering same which we expect to go forward on the following steamers:
> Coolgardie ..... June 3rd
> Waimarino ..... June 30th
> Cacique ..... *July 12th*" (309)

On June 6th, libelant wrote to respondent, answering its letter of June 1st, saying:

> "We note with surprise your remarks on the subject of June loading, and, of course, do not agree with the contention which you reserve. We certainly cannot understand how, if you were not able to supply the agreed tonnage by a later date, your plans to supply it at an earlier date could have been disturbed, and will accomplish our contract in accordance with its terms." (135)

On June 6th, the San Francisco agent wired to respondent:

> "Grace now figures 'Cacique' will clear about July 5th." (308)

On June 7th, the San Francisco agent wrote to respondent:

> "We sincerely hope that you will be able to fill the space with your own cars rather than let it go to any other concern for a lower figure.

Regarding the change of dates of Cacique sailing, information has come to us which had not previously been made public to the effect that the Cacique had met with an accident after leaving Vladivostok, Russia, which necessitated repairs and again it was necessary to put her on the ways in Hong Kong which further delayed the boat, and we were only recently informed of this change, although the movements of the boat had led us to believe that it would be much later than the middle of June before her departure, *and it is now our hope that she will even be as late as the 10th of July as we wired you recently.*" (308, 309)

On June 9th, the respondent wired to San Francisco agent:

"Owing congestion large quantity cars arriving Australia at one time may be necessary to cut down Cacique cargo by Sydney, Brisbane and Melbourne cars and ship these later * * * Do not load any cars Cacique unless Grace agrees that their default has voided any alleged contract, and that 4600 tons less what may be held as above will be loaded at $47.50 per ton and this cargo will not be held for freight for the balance." (300)

On June 9th, respondent wired to San Francisco agent:

"We have already written Grace and Company that sailing date in July voids any contract even admitting there is one binding on this company which we do not. From the outset we have made it clear that we consider ourselves bound for 4076 tons, plus Peabody space, that is 4600 tons. Before any cars loaded on Cacique see that this understood with Grace so that the loaded cargo will not be held for entire freight; otherwise do not load any." (302)

On June 10th, respondent wired to San Francisco agent:

> "Our wire ninth have decided to not hold up shipments to Sydney Brisbane Melbourne. Will load 4600 tons all told provided Grace agree this is in fulfilment of any contract and will not hold what loaded for entire freight." (302)

On June 13th, San Francisco agent wired to respondent:

> "Grace insist on 6200 tons or freight on unused space." (303)

On June 13th, respondent wrote to San Francisco agent:

> "Will you please also write Messrs. Grace & Company and inform them that the 4075 odd tons is the full cargo for the S. S. Cacique; that we recognize no contract binding upon this company to forward 6200 tons for this vessel and that unless the 4075 tons is taken on this understanding, and not subject to freight for 6200 tons we will not load any of this cargo." (307)

On June 14th, respondent wrote to libelant:

> "Any arrangements that you have made for 6200 tons were effected through Ford Motor Company of San Francisco, which arrangements we do not, and never have considered binding upon this company, and which information we have previously given you and now repeat.
>
> We have forwarded 4075 odd tons of cargo for your S. S. Cacique at an ocean freight rate of $47.50. *This is the entire cargo that we will forward for the vessel,* and is the cargo that you have been informed from time to

time would be forwarded for this vessel. *If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this company for 6200 tons' space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate we will decline to load any of the cargo whatever.*" (50)

This letter was received by libelant on June 23rd. (135)

On June 22nd, the San Francisco agent wrote to respondent:

> "*We have issued instructions to the Southern Pacific Company, who now have in their possession all of the consignment for the Cacique, to hold same until they receive from us instructions to deliver to Grace & Co.*" (303, 304)

On the same day the San Francisco agent wrote to Southern Pacific Company:

> "Until you are advised to do so, *please do not, under any circumstances, deliver any of the cargo at present on hand booked steamer Cacique to W. R. Grace & Co.*" (304, 305)

On the same day libelant advised respondent:

> "Please note the delivery of 6200 tons automobiles and parts full quantity of your engagement under contract dated February 25 must commence on that date, June 27, and be completed not later than June 29." (142)

The letter dated June 14th, sent by respondent to libelant, was received by libelant on June 23rd. (106) On that day, then, libelant was notified in

unmistakable terms that respondent repudiated the contract for 6200 tons. On the preceding day the Southern Pacific Company had been instructed by respondent not to deliver any cargo to libelant. On the following day, June 24th, the San Francisco agent of respondent sent to libelant the following notice:

> "We are in receipt of advice from our Ford Ontario factory in which they request that we inform you that 4075 odd tons is the full cargo for the steamer Cacique, and *that they recognize no contract binding upon them to forward 6200 tons on this vessel.* Also that unless the 4075 tons is taken on this understanding and not subject to freight for 6200 tons, they request that *we withhold loading any of this cargo.*" (109)

This letter was received by libelant on June 26th. (137)

On June 26th (a Monday) libelant sent a telegram to respondent, reading:

> "Referring to your contract with us of date February 25, 1916, wherein you agree to ship 6200 tons 40 cubic feet each of automobiles and parts, in packages, at $47.50 per 40 feet cubic measurement, freight prepaid, *since you have informed us, in your letters of the 14th and 24th inst. that you will not deliver to us the 6200 tons which you agreed to deliver, we now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular.* We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that *we will take such quantity of automobiles as are*

> *delivered to us, and hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract.* By taking a smaller quantity of automobiles than the quantity which you contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as the *partial satisfaction* which it, in fact, is; and by the acceptance of any such smaller quantity we do not in any way release or waive any claim for damages or demurrage due to your breach of your contract." (138, 139)

About June 22nd, 23rd and 24th, the Southern Pacific Company had deposited about 1100 packages on libelant's wharf. Thereafter Mr. Moore, agent for libelant, who had charge of this transaction received a telephone message from the local office of the Southern Pacific Company advising "that the delivery of that cargo to the Cacique had been held up, on instructions received, I believe, from the Ford Motor Company". (318) "Mr. Hardy asked me if he could get back the packages which had been delivered to the wharf." (319) "Some of this freight was delivered to the wharf after they received this notice from the Ford Co. to hold it up." (319) Mr. Moore thereupon reported these facts to his superior in libelant's office:

> "Mr. Moore reported that he had had this telephone from the Southern Pacific Office, and had been there, and had called and had learned that this cargo then on the dock *had been delivered by them by mistake, and they wanted*

it returned; this in view of the fact that they had received instructions from the shippers not to deliver the cargo.

Q. Did you, or W. R. Grace & Co., at any time thereafter receive any notice from the Ford Motor Co., or anybody acting for the Ford Motor Co., advising you that these cars were now available for shipment on the Cacique? A. No." (321)

The Southern Pacific Company, thereafter, and in the forenoon of June 27th (251) advised counsel for libelant of the instructions received by respondent not to deliver the cargo to the Cacique, and inclosing the original letter of instructions, on the letter head of the Ford Motor Company, Automobile Manufacturers, San Francisco, June 22, 1916, reading:

"Until you are authorized to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked steamer Cacique to W. R. Grace & Co.

Ford Motor Co.
Traffic Department,
L. C. Davis." (262)

Thereafter, and on the same day, the libel was filed.

Many of the facts disclosed by this correspondence were not known to libelant before the day of the trial. Libelant called for the correspondence at the trial, and respondent produced what it could, explaining at the same time that the American Ford Company's office at San Francisco "having no interest in this suit, destroyed their files two years ago". (264) From the correspondence produced it appears, however, clearly:

1. That respondent had contracted for more space in steamers bound for Australia than it had cargo to fill, being offered cheaper rates by other carriers after making the Cacique contract.
2. That there was a congestion of automobiles in Australia.
3. That respondent was never ready to prepare or ship 6200 tons, as it had contracted.
4. That, for all of these real reasons, respondent was anxious, if possible, to have this contract cancelled.
5. If it could not be cancelled, then respondent *was anxious to have its performance delayed* beyond June and until such time as it would have enough cargo ready, and Australia would be ready to absorb it.
6. To get rid of the contract, respondent, *pretended* at first that the contract had not been received in the East, and later that the San Francisco agent had no authority to make the contract, because Ford Motor Company of Canada and Ford Motor Company of San Francisco were two distinct entities. Both of these pretences were later abandoned, when the ingenuity of the legal department discovered more plausible reasons.
7. One of the new reasons for rejecting the contract was that the contract required a June *sailing* of the Cacique. This was palpably wrong.
8. A more plausible alleged reason for rejecting the contract was finally relied upon, viz., a construction of the contract to the effect that libelant *must* perform in June, but could not become ready to perform in June. This latter construction is inconsistent with its earlier construction to the effect that loading in July would have been a compliance.

The difficulties and inconsistencies in which respondent became involved in its endeavor to find plausible grounds for extricating itself from an unwelcome contract appear not only in the correspondence, but also in respondent's answer. To illustrate:

Respondent alleges:

> "That the said Southern Pacific Company, on the 23d and 24th days of June, 1916, delivered into the custody of libelant, on Pier No. 26, approximately 1115 packages of automobiles and parts, in packages, measuring approximately 1500 tons, for shipment on said steamship Cacique * * * that at the time of said delivery to libelant said steamship Cacique had not arrived in the port of San Francisco on her inward voyage from Oriental Ports, and at said time a strike of stevedores was prevailing among the wharves in the harbor of San Francisco, and particularly against libelant herein; *that on the 24th day of June, 1916, claimant and respondent, being advised that the delivery of any more of said cargo on said pier would endanger the safety of said cargo at the hands of strikers, and that the surrender by the Southern Pacific Company of possession of said cargo under the circumstances might entail great loss to claimant and respondent in the event that said automobiles and parts were destroyed by fire, after they had left the possession of said railroad company on said wharf* and prior to being loaded on the said steamer Cacique when in readiness and in fit condition to load the same, and having no definite assurances from libelant as to the date when said cargo would be loaded upon the said steamship Cacique, *then instructed said Southern Pacific Company not to make further deliveries to libel-*

ant until notified so to do by claimant and respondent, and that it was necessary that said Railway Company should retake into its possession the portions of said cargo already delivered. * * *'' (32-34)

Respondent further alleges, with reference to the delivery by the Southern Pacific Company, on libelant's pier, of the 1115 packages, on or about June 23rd and 24th.

"That at said time a strike of stevedores prevailed on the wharves in the harbor of San Francisco, and particularly against libelant, and thereupon claimant and respondent, fearing possible damage to its said packages of automobiles and parts from fire and violence, and not knowing whether said S. S. Cacique, which had not then arrived in the port of San Francisco, would be able to load and sail with said cargo during the month of June, as required by said contract of February 25, 1916, on June 24, 1916, requested said Southern Pacific Company to delay further deliveries until instructed by claimant and respondent to make them, and to retake into its possession the said packages previously delivered to libelant. * * * '' (39)

Respondent further alleges that:

"Thereafter, on said 27th day of June, 1916, and prior to the filing of the libel herein, the said S. S. Cacique having arrived at the port of San Francisco on that day and having berthed at said Pier No. 26, *claimant and respondent withdrew its said order and request to the Southern Pacific Company.* * * *'' (40)

In answer to these allegation, we say:

The evidence produced at the trial shows that the allegations are *untrue.* The order to the Southern

Pacific Company, given on June 22nd (*before* the goods were placed on the wharf) were *not* given for the Pecksniffian reasons alleged in the answer: that respondent feared temporarily for the safety of its goods, but were given to enforce the threat previously made to libelant: "If you take the attitude that there is a contract binding upon this company * * * we will decline to load any of the cargo whatever." (50) The bold allegation that respondent withdrew its order to the Southern Pacific Company prior to the filing of the libel, the Cacique having arrived and berthed at its pier, is also *untrue,* for the conclusive reason that it is *impossible,* the libel having been filed before the Cacique arrived and berthed.

As to the allegations in respondent's answer that the 1100 packages which were deposited by Southern Pacific Company on libelant's wharf

> "were then in the possession of libelant *in part performance by claimant and respondent of said agreement of February 25th,"* (34)

and as to the inference suggested by the allegation

> "that if the loading of said cargo did not commence at the time when libelant gave notice of the readiness of said steamship to load the same, *it was due to the act of libelant* in attaching said cargo," (42)

viz.: the inference that respondent was then ready to load any cargo, it is flatly disproved by respondent's orders to Southern Pacific Company, which orders were in line with the attitude assumed by

respondent that, if libelant insisted upon its contract, respondent would "decline to load any of the cargo whatever." (38)

The Questions Involved.

First: The fundamental question involved in the case is the proper construction, under all the circumstances of this case, of the clause:

> "Shipment: Per American S. S. Cacique June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date."

Libelant contended in the District Court, and contends now that the words "Cacique June loading" were used by the parties to designate the second loading of the Cacique after the date of the contract, expected to be in June, excluding the first loading after the date of the contract, expected to be in March or April. Respondent contended that loading of the cargo during the month of June was a condition precedent, and that it was libelant's imperative duty to begin and end loading in June.

Second: The second question of importance is the question of fact at issue between the parties, whether the contract was breached, either actually or by anticipation, libelant contending that respondent was never ready or willing to perform its contract, and finally breached it, both by anticipation and actually.

Third: The third question of importance is the measure of the damages to which libelant is entitled.

Fourth: At the trial in the District Court a new, and technical, question was injected into the case, based upon the alleged defence that libelant lost its right of action by accepting a part performance under the contract after respondent's anticipatory breach.

The District Court, holding that there had been no actual breach of the contract when the action was commenced, and that libelant had then waived any anticipatory breach by accepting a part performance of the contract, dismissed the libel. The case being decided on the technical point was never considered on its true merits. The "fourth" question, having become the decisive one in the lower court, will be discussed herein first, and, this being a trial de novo, we will, thereupon, take up the discussion of the substantial points upon which this controversy depends.

Argument.

I. THERE WAS AN ACTUAL BREACH OF THE CONTRACT BY RESPONDENT WHEN THE LIBEL WAS FILED.

The situation, on June 27th, was the following:

1. When the action was commenced, respondent had sent to San Francisco 180 carloads of automobiles (making 4075 tons, instead of 6200 tons, required by the contract).

2. 150 out of these 180 carloads were in the possession of the Southern Pacific Co., and 30 carloads had been deposited by Southern Pacific Co. on libelant's wharf.
3. Respondent had notified libelant, in effect: We will not give you any part of this freight under the terms of the contract of February 25th; we do not recognize this contract. We offer you this freight under a new contract. If you reject our offer, we decline to load any of this freight on the Cacique. We will pay you $47.50 for the offered 4075 tons if you accept a new contract and waive the balance of the 6200 tons; but we will withdraw even this freight thus offered, if you insist upon your contract.
4. Respondent also had notified Southern Pacific Company not to give any cargo to libelant.
5. Southern Pacific Company had placed 30 carloads (about 1100 tons) on libelant's wharf, by mistake, but had later notified libelant that these cars were stopped by respondent in transit, and had requested their return.
6. The Cacique was expected to, and did arrive at her berth in the evening of the same day.

In order to obtain jurisdiction over the absent respondent and reach the 150 carloads in the possession of Southern Pacific Company, libelant attached these 150 carloads by process of foreign attachment.

In order to reach also the cars *deliverd into the custody of libelant by mistake,* libelant attached them by process in rem.

The performance of the obligations of this contract began on May 1st. On that day respondent wired to San Francisco: "We start Cacique contract today." (315) The original intention was to ship 1316 cars; but, on May 11th, it was found "to be impossible to ship this number on account of new method of crating", and the Cacique schedule was then reduced to 1288 cars. (282, 283) The whole shipment, 4075 tons, was under way by June 1st; at the time of the filing of the libel all the railroad cars carrying it had arrived in San Francisco, 30 of them having been placed on libelant's wharf by mistake of the railroad carrier. Repeatedly, during the month of June, respondent refused to deliver 6200 tons as required by its contract, and repudiated this contract on various pretended grounds. Waiving for the moment the question, whether this repudiation was, at any particular stage, an anticipatory breach of the contract, we contend that June 27th was *within* the period of time set for the performance of the contract, actual performance having commenced on May 1st, and that respondent's acts, before June 27th, constitute an *actual* breach of its contract. Among other duties, respondent was obligated to send 6200 tons from its factory to the Pacific Coast; instead of performing this duty, it sent 4075 tons, categorically refused to send more, and told libelant: You take this much, or you get nothing. It was also obligated to make a cargo of 6200 tons ready for the Cacique and to dispatch the intended cargo to libel-

ant's wharf "as fast as vessel can load"; instead of performing this duty, it stopped the goods in transit in order to compel libelant to surrender a good contract and accept in its place a new and less advantageous one. Part of the shipment had actually found its way to libelant's wharf; but notice had been given to libelant: Do not touch it, do not prepare it for loading on the Cacique under the contract of Febrary 25th. On June 27th respondent still definitely refused to continue to perform its part of the contract. The legal effect was, to exonerate libelant from any further performance; and to give libelant an immediate right of action for his damages.

It makes no difference, whether libelant had then begun its performance or not; but in fact it had, and the Cacique was being dispatched and arrived on the same day in port.

The District Court held that, on June 27th, there had been *no actual breach* of the contract "for the reasons: 1. That the vessel was not at that time in condition to load; 2, there were 1100 pieces of respondent's freight on the wharf which libelant treated as having been delivered in part fulfillment of the contract".

We respectfully submit that the court is in error, as to both alleged reasons. As to the first alleged reason, it is clear that the duties of respondent under the contract began long before the vessel was to be in a condition to load. In fact respondent began

performance of them on May 1st and even before. These duties were to prepare a cargo in its Eastern factory, to ship it by railroad to San Francisco, and to hold it in readiness at San Francisco for loading on the vessel as fast as she could load. It was in the course of the performance of these contractual duties that respondent was guilty of several actual breaches: 1. In not preparing or shipping the contracted quantity; 2, in positively refusing to hold *any* of its goods ready at San Francisco for the performance of *this* contract. Either of these acts were actual breaches of the contract.

As to the second alleged reason, it is respectfully submitted that libelant's act in commencing an action against respondent and attaching the 1100 pieces of respondent's freight would be a very inadequate way of expressing the view that these 1100 pieces were delivered in part fulfillment of the contract. The treatment accorded to these pieces by libelant, in attaching them, is naturally more consistent with the view that the owner of the pieces *was* guilty of an actual breach of the contract, or that the goods themselves, as the originally intended cargo of the Cacique, a contracting and wrongdoing thing, were subject to an admiralty lien, on account of the actual breach of the contract.

The District Court holds that the libel was filed "before performance was due." (450)

We contend that performance under this contract was due long before the libel was filed; that, in fact,

respondent recognized this, actually commenced the performance of its obligations on or before May 1st, and continued performance thereafter, subject to the naive reservation, made on June 1st:

> "We wish it, therefore, definitely understood that *if* by reason of the above and other circumstances *our plans for supplying 6200 tons for this vessel did not carry through,* we do not consider our obligation binding." (49)

II. ON THE THEORY THAT RESPONDENT PERMITTED AN ANTICIPATORY BREACH, SUCH BREACH SUPPORTED THIS ACTION UNDER THE FACTS OF THE CASE.

1. This case went off, in the court below, on mere technicalities which, under the strict rules of procedure of the common law, would perhaps be conclusive, but which, it is respectfully submitted, have no proper place in the practice of the admiralty courts of the United States. The case was tried on behalf of respondent by a master of common law procedure, and if that procedure is to prevail in this court, the proctor for libelant is under an admitted disadvantage as to both ability, and experience. On this appeal, we believe, mere errors in dates, or questions of variance, or alleged shortcomings of counsel, will not be visited upon the client; mere technical rules and forms will be disregarded, and those rules of natural justice will be decisive to which this court referred in the case of *Davis v. Adams,* 102 Fed. 520. Assuming, for the sake of argument, that alleged technical mistakes were made by libel-

ant, which respondent claims to be waivers of respondent's breach of contract, we believe that this court, in the interest of justice, will rectify them; that it will, if it be necessary, supply deficiencies, "even suggesting to the party the means of reconstructing his case, if necessary". In the Davis case this court cites, with approval, the following language of the Supreme Court in the case of *The Gazelle and Cargo,* 128 U. S. 474:

> "In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance or of departure in pleading, as at the common law; and if a libelant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants."

Respondent could not be misled or prejudiced in maintaining its alleged defense by even an amendment of libelant's pleading in this court (if this were necessary to produce a just result); for the facts are before this court as they were before the lower court, and it is proper for us to ask the court to view them in the spirit of substantial justice prevailing in admiralty, and to decide this case on the merits of the substantial controversy involved, instead of showing the door to libelant because, perchance, it may, in the heat of the rapidly

succeeding events, have been in error as to some technicalities of mere pleadings or practice. In the Davis case this court allowed libelant, after all the evidence was in, and "at any stage of the case," to change the libel for a tort to one based on contract. Assuming that libelant had made a mistake in attaching the 30 carloads of automobiles in its possession by process in rem, and assuming that such a proceeding was null and void, the attachment could have been set aside on motion of respondent. There were still the 150 carloads in possession of the Southern Pacific Company and attached by the U. S. Marshal to confer jurisdiction on the court and give libelant an effective remedy. Even assuming that libelant held a mistaken view of its remedies against the 30 carloads in its possession, the principle would apply that

> "A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice."
> *Wiggins Ferry Co. v. Ohio & M. Ry. Co.,* 142 U. S. 396.
> Cited in *Davis v. Adams,* supra, p. 525.

In *Dupont v. Vance,* 19 How. 173, the Supreme Court said:

> "There are no technical rules of variance, or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record and prayed for by the libel, because that entire case is not distinctly stated in the libel."

When the libel was filed, the legal status of the 30 cars on libelant's wharf was anomalous and doubtful. It depended upon facts better known to respondent and its agents than to libelant. It could not be weighed and determined by libelant with the same clarity as would have been possible after the facts became known, at the trial, through the correspondence between respondent at Toronto and its San Francisco agent, and the Southern Pacific Company. This correspondence was not available at any time before the trial. The real facts were known only to respondent, while libelant was being regaled with pretended facts in pursuance of respondent's endeavor to establish *some* kind of a defense to its plain breach of contract.

2. The District Court, in its opinion, *assumes* that

> "there was an *anticipatory breach* committed by respondent when it notified libelant that it would furnish only 4075 tons of freight, and insisted that the amount so furnished should not be held by libelant for the 6200 tons contracted for." (450)

The court, however, held that, before the libel was filed, libelant had accepted a part performance under the original contract, and had therefore waived the anticipatory breach. This conclusion of the court is based upon the following premises:

That libelant treated the 1100 pieces of respondent's freight on the wharf "as having been delivered in part fulfillment of the contract" (450) *by*

filing its libel in rem against them. That by doing so libelant "elected to accept such 1100 pieces as part performance of the original contract. It could have no action in rem against them, unless delivered and received as freight under the contract." (451)

It is respectfully submitted that the court apparently confuses the primary rights flowing from the contract with the secondary rights and obligations flowing from a breach of a contractual duty. When respondent breached the contract by anticipation, libelant at once acquired the right to damages, a secondary right created by the law to compensate for the breach of the primary right created by the contract.

In attaching respondent's goods libelant enforced a *remedy* which had its foundation in a *breach* of the contract, and not in its continued existence. Libelant attached the goods *because* there was a *breach* of the contract, and not for the purpose of indicating that the contract was still alive. If its object had been to elect to accept performance, the method by which it signified such election would certainly have been ill-chosen. The goods had been placed upon its wharf by mistake; they were offered by respondent as a cargo under a *new* proposed contract which libelant rejected. The finding that libelant *accepted* the goods in part performance of the original contract could only be based upon a previous finding that respondent offered them in part performance of the *original* contract. But the evidence is clear and uncon-

tradicted that respondent did not so offer them; that it denied the validity of the original contract; that it attempted to impose upon libelant a *new contract;* that the goods on the wharf were *not* delivered as freight under the contract, but were offered to libelant in performance of this new proposed contract as Cacique freight. Libelant did not accept them as Cacique freight under the *proposed* contract, which it rejected; it did not accept them as Cacique freight under the original contract; but it proceeded against them by attachment, *because* the original contract had been breached by respondent. The action against the goods was chosen by libelant —not in the performance of the contract, but as a remedy for its breach. The admiralty lien arises against the wrongdoing thing and presupposes that the wrong (here in the nature of a breach of the contract) *has* been done. Respondent's original obligation was to deliver the 1100 packages in the 30 cars, together with many others, to libelant as Cacique freight under the contract; it left the 30 cars on libelant's wharf and gave notice to libelant, and to the Southern Pacific Company, that they were not to be used under the original contract, offering them, at the same time, to the Cacique as freight under another proposed contract. Libelant had a right to consider them as a wrongdoing res and to enforce an admiralty lien against them, as security for the payment of its damages.

3. But if it be *conceded that libelant was mistaken in law,* by attempting a remedy against these

goods as a wrongdoing res, the result would be that respondent would have had it in its power to have the attachment dissolved by proper motion. From the premises that *if* the goods had been delivered and received as freight under the contract, libelant would have an action in rem against them, the converse proposition does not follow. If libelant was mistaken in its remedy; if it had no right to attach the goods by process in rem, it follows, on the contrary, positively, that the goods were *not* delivered or received as freight under the contract. It is difficult to see how the mere filing of a libel in rem against 1100 packages can be considered as evidence of an election of the libelant to accept these packages as part performance of the contract of affreightment. Prima facie the filing of the libel raises the opposite presumption, viz: that the packages, or their owners, are wrongdoers in admiralty, in having breached the contract.

If the process in rem was extra-legal,

> "the claimant merely waives an objection to the enforcement of it by a form of procedure against his property. He acquiesces in the court's jurisdiction over the thing belonging to him, just as he might over his person, tho' not properly served with process. It would certainly be sticking in the bark to compel a libelant in a suit in rem to begin a new suit in personam, notwithstanding that the claimant consented to have his rights determined in the suit in rem."

The Susquehanna, 267 Fed. 811, 813.

It is true that libelant was always ready and willing to perform; but

> "A willingness and readiness to perform, on the part of one party to a contract, without any demand on the other party who has wrongfully refused performance, or without doing anything which places the latter in a worse position, or which tends to enhance the damage which might be recovered, or deprives the innocent party of any right, or increases the rights or immunities of the wrongdoer, does not show that he has not accepted the other's renunciation as final."
>
> 15 *C. J.* 653.

> "The willingness to perform indicates a disposition to do what is right."
>
> *Mut. Reserve Fund L. Ass'n v. Taylor,* 37 S. E. 854 (Va.).

The injured party to a contract does not lose his rights against the wrongdoer by continuing to be fair, in spite of the other's wrongdoing.

In *Tri-Bullion Smelting Co. v. Jacobsen,* 233 Fed. 646 (1916), the Circuit Court of Appeals for the Second Circuit considered the question, whether an anticipatory breach by defendant was cured by subsequent acts of the plaintiff. The court said:

> "The theory of Tri-Bullion seems to be that *because, in the letter, Jacobsen urged Tri-Bullion to proceed to fulfil the contract,* he was thereby precluded from bringing action for an anticipatory breach, but must perform all of the provisions of the contract called for on his part." (648)

The court held that:

> "Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out, failing which such other party states that he will be compelled to purchase goods in a rising market." (649)

In the instant case:

> (I) Respondent insisted repeatedly that it was not under legal obligation to perform the contract;
>
> (II) This insistence was coupled with a continuance of its original stand, and refusal to perform the contract.

Therefore the breach was plain. Respondent cannot successfully take refuge in the plea that it must be excused because libelant urged that the contract be carried out. Nor can we see that a plea could be successfully made, that respondent must be excused because libelant, insisting upon its rights under the contract, brought an action in court and attached the goods in the enforcement of what, rightly or erroneously, it considered to be an appropriate legal remedy.

On June 27th libelant was justified, in the light of the circumstances, in taking the view that these 1100 packages, placed on its wharf by respondent as the result of the contract made between libelant and respondent, were sufficiently connected with

its steamer Cacique to give libelant a lien upon the packages for the enforcement of the contract, when respondent threatened to take them out of libelant's custody.

Insistence upon remedies, such as damages, and liens for security in the collection of damages, cannot be construed as an election, by libelant, to consider the contract still alive. A contract, even after breach by one party, is still alive for the purpose of giving rights and remedies to the injured party.

How could the intent to waive a breach be negatived more clearly than by the commencement of an action against the wrongdoer?

In *Marks c. Van Eighen,* 85 Fed. 853 (Circuit Court of Appeals for the Second Circuit), it was said that:

> "In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated *was signified by the prompt commencement of the action.*"

The distinction between

(a) Waiver of the right to treat a breach of a contract as a discharge of the contract, and

(b) Waiver of a right to recover the damages occasioned by the breach

is discussed in *"Frankfurt-Barnett Co. v. William Prym Co.,* 237 Fed. 21 (C. C. A., 2nd Cir.) The court said (28):

"The difficulty in this case has grown out of the failure to distinguish between a waiver of the right to treat a breach of a contract as a discharge of the contract, and a waiver of the right to recover the damages occasioned by the breach. The two rights are distinct and must not be confused. In Page on Contracts, Vol. 3, § 1519, that writer correctly says that waiver of the right to treat a breach of contract as a discharge of contract liability may take place without a waiver of a right to maintain and action for damages, and the weight of authority is that it is not such a waiver. And in section 1510 the same writer states: that acceptance after breach is not a waiver of a right of action for damages is apparent when it is considered that the party not in default is often constrained by his necessities to take what he can get under his contract when he can get it."

The case of *Marks v. Van Eighen,* above cited, was also cited by respondent in its argument in the lower court. (427, 432) The principles laid down in that case may be considered as common ground between the parties to the instant case. The court said:

"It must be considered as settled law that, where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages; and, if the latter elects to treat the contract as terminated, his right of action accrues at once. The latter, however, must elect whether he will treat this contract as terminated, or as still existing; and, if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the exist-

> ing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract."

Adopting these principles, the following facts are proved by the evidence, showing that libelant is entitled to a decree:

First. Respondent renounced the contract without cause.

Second. The reunciation is evidenced by frequent acts and notices given to libelant, after respondent had commenced a part performance of the contract by sending from the East carloads of the cargo contracted for, and before libelant was required to do anything under the contract except to provide the steamer thereafter and to refrain from encumbering the cargo space reserved by respondent with freighting engagements. The renunciation occurred, therefore, while the contract was in progress of performance by both parties, or "before the time for performing it had elapsed."

Third. The effect of respondent's renunciation was to authorize libelant to treat the contract as terminated, *without prejudice to libelant's right of action for damages.* The enforcement of this right of action by libelant was consistent with treating the contract as terminated; indeed the termination of the contract was the very basis upon which libelant's action is founded.

Fourth. Libelant elected to treat the contract as terminated. Could a clearer expression of an election be suggested than that of advising respondent in a formal action that, because it had terminated the contract, libelant demanded the damages to which the law entitled it, and invoked the remedies which it considered to be proper in law? If it had been the intention of libelant to elect that the contract was still existing, it would *not* have attached respondent's goods. The procedure of invoking the custody of the law for them was a conclusive election, on the part of libelant, to rely upon the remedies which the law, in the opinion of libelant, provided in cases of breaches of contract by the owner of the goods.

Fifth. Libelant's right of action for a breach can safely rest upon respondent's refusal, on June 27th, to perform the contract, according to its terms. Libelant had then been definitely notified that it would receive no cargo whatever, unless it accepted a new contract proposed by respondent in the place of the contract renounced.

Sixth. The renunciation was unequivocal and determinate. Respondent had, both directly and indirectly, and very distinctly, signified its intention not to provide the 6200 tons contracted for, and in fact not to provide any cargo whatever, unless libelant would consent to rescind the original contract.

In every respect, therefore, is libelant's case supported by the principles of the Marks case.

4. A minor reason for the finding of the District Court that "the repudiation was not accepted by libelant as such" is that *"it held 1100 packages as freight delivered in pursuance to the contract after such repudiation."* (452)

In this connection, the court cites from the testimony of Mr. Carter, libelant's manager, on his cross-examination:

> "Q. So that you knew at that time that the Ford Motor Company had actually delivered 1100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver?
>
> A. Yes, but also knew it was *delivered by mistake.*
>
> Q. That is, it was not intended as freight for the steamer?
>
> A. No, *it was not the intention of the Ford Motor Company to give us that freight."* (451)

This testimony is corroborated by the facts as they appear from the correspondence in evidence.

The cross-examination then proceeded as follows:

> "Q. And it was not received by you as freight?
>
> A. It was received as freight.
>
> Q. It was received as freight?
>
> A. It was received as freight.
>
> Q. Then you had it as freight?
>
> A. We did." (451)

Of course the purpose of this clever cross-examination was to create the inference that libelant held the 1100 packages as freight in *pursuance of the contract,* and the libelant, by having the packages

on its wharf, was keeping the contract alive; but it is submitted that this testimony is consistent with the fact that the packages were held "as freight" to be used in mitigation of damages, especially as the witness added:

> "We naturally, when we placed our libel, libeled everything we could find of Ford." (452)

In *Sperry & Hutchinson Co. v. O'Neill-Adams Co.,* 185 Fed. 231, (C. C. A., 2nd Cir.) a trading stamp contract bound plaintiff to pay for stamps purchased during one month on or before the 15th of the succeeding month. On January 15th it was manifest that defendant had broken the contract and intended to continue doing so. Plaintiff continued to buy stamps under the contract, and defendant contended that plaintiff waived its right to avail of the breach.

The court held, in the language of Judge Lacombe:

> "It is next contended that plaintiff waived its right to avail of the breach, because it continued buying stamps under the contract after the injunction was issued on December 18th. We find no force in this contention. The breach was a continuing one. What defendant would finally do was not certain until the injunction was made permanent. It might make some arrangement * * * which would result in a withdrawal of the injunction suit. *Until it was definitely known what the end would be plaintiff could go on without waiving any of its rights.* On January 15th and every succeeding day there was a new breach of the contract."

So in the instant case. The breach was a continuing one. Libelant had been notified repeatedly that respondent would *not* perform *this* contract. The willingness of libelant, before it was definitely known what respondent's final decision would be, to carry out the contract, in case respondent should change its mind and perform on its part, did not deprive libelant of its rights. Much less did libelant lose any of its rights by the seizure of the 1100 packages as security against the damages it might expect to recover in its action for the breach.

On June 23d and every succeeding day, there was a new breach of the contract.

The following cases involve analogous points:

> Where one party to a contract seeks to avoid compliance therewith, the other party may, without waiving his rights, make an honest effort to induce compliance.
>
> *Louisville Packing Co. v. Crain,* 132 S. W. 575 (Ky.).

> Where defendant informed plaintiff that defendant could not and would not do what defendant had contracted to do, plaintiff's right of action for breach of the contract then accrued, and the breach was not waived by plaintiff's subsequent ineffectual demand for commencement of performance.
>
> *Bologh v. Roof Maintenance Co.,* 112 N. Y. S. 1104.

No argument is required to show that the letters and conduct of respondent constitute a repudiation

of the contract. We *have* shown that libelant accepted them as such.

In order to prove, now, that libelant, on its part, had performed all the terms and conditions of the contract when the libel was filed, it becomes necessary to consider the construction of the contract.

III. CONSTRUCTION OF THE CONTRACT.

The original controversy turned about the construction of the following clause:

> "*Shipment*: Per American S. S. Cacique June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date."

Respondent contends that this contract called for a "*loading and clearing in June,*" and that the contract was "*inoperative* by reason of the fact that your S. S. Cacique has already taken out a clearance for July 5th." (51)

In order to be able to detach the words "June loading" from the word "Cacique," and thus to give an independent meaning to the words "June loading," respondent has introduced a comma between the word "Cacique" and the words "June loading" in the contract; but the contract signed by the parties does not contain this comma.

Libelant, on the other hand, contends that, in the light of all the circumstances, as they will appear hereafter, the words "*Cacique June loading*"

were intended by the parties to the contract to signify the expected *second* loading of the Cacique after the date of the contract, and to exclude the *first* loading of the Cacique after the date of the contract, which was expected to be in March.

"In every case the words used must be *translated into things and facts* by parol evidence." (*Doherty v. Hill,* 144 Mass 465.) The court could not know, as a mere matter of interpretation or construction of the language used, what the word "Cacique" meant in the situation of the parties *at the time of the making of the contract,* nor what the words "Cacique June loading" were intended by the parties to express. The evidence in the record which places the court in the situation of the parties shows: *first,* that, on the day when the parties made the contract, they knew that the next loading of the steamer Cacique at San Francisco which was expected to be in March would not suit respondent's plans, and their contract, consequently, contemplated the second loading after that day; and *second,* that after the making of the contract, respondent itself confirmed this understanding frequently by its own acts and conduct. The practical interpretation given to the contract by respondent is of the greatest value in this connection.

a. **The prima facie meaning of the language of the contract.**

The contract shows on its face that *no exact date* is stipulated for the loading or shipping of the cargo; that, on the contrary, the loading date is ex-

pressly left indefinite. Libelant undertakes to "advise you more definitely as to exact loading date," "when vessel is closer at hand." In other words, libelant says: I cannot now give you the exact loading date. "Date" includes not merely the *day* of the month, but also *the month.*

Shipmen v. Forbes, 97 Cal. 572;
Heffner v. Heffner, 20 So. 281 (La.).

Prima facie, therefore, the words: "will advise you as to exact loading *date"* mean: "will advise you as to exact *day and month"* when the Cacique will load. That the parties in fact intended what their language *connotes prima facie,* is confirmed by the circumstances of the transaction, both at the time of the making of the contract, and by the practical construction which respondent gave to it down to the eleventh hour, when its advisers opened the door for the introduction of a technical excuse for its breach of the contract.

Had the parties intended that loading in June should be *warranted,* they would have followed the usual custom of adding a "cancelling date", providing that, "if the ship is not ready to load on or by a certain date, shippers would have the option of cancelling." (181)

Respondent's attempt to, first, detach the words "June loading" from the word "Cacique and to, then, give a literal meaning to the words "June loading," recalls the warning language of the Supreme Court in *Reed v. Insurance Company,* 95 U. S. 23, that

> "a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties."

In this connection the following words of the same court, in the same case, *are a propos:*

> "That such was not the sense in which the parties in this case used the words in question is manifest, we think, *from all the circumstances of the case.* Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities."

In the *Reed* case an insurance risk was suspended, while the vessel was "at Baker's Island loading", and the question was: Does this mean: while the vessel was "at Baker's Island *for the purpose* of loading"? or does it mean: while the vessel was "at Baker's Island *actually* loading"? The court held that a strictly literal construction *would* favor the latter meaning, but rejected that meaning in the light of evidence showing the circumstances.

In the instant case the construction for which we contend is in accordance with the *prima facie* meaning of the words: "Exact loading date". We do not ask the court, as was done successfully in the Reed case, to *reject* the strictly literal meaning, but contend that the words: "per Cacique June loading—will advise you more definitely as to loading *date*" have the same meaning, whether interpreted literally, or in the light of all the surrounding circumstances, viz: that the shipment should be made per S. S. Cacique at her expected June loading, the second loading after date, in this port: that the exact loading date could not be definitely determined so far in advance, but that the loading was expected to be in June.

Before entering upon a review of the evidence on this subject, we would point out the proper and usual method of expressing an intention to make the arrival of a ship at an exact date a condition precedent to furnish a cargo:

Abbott, on Shipping, (14th Ed.), after showing the disinclination of the courts to construe such agreements as conditions precedent, says:

> "The merchant, however, may make the arrival of the ship by a particular time * * * a condition precedent to furnishing a homeward cargo for the ship, *by special and particular proviso* * * * and this is the proper method to be adopted, in order to give effect to such an intention on the part of the merchant. For although the contract by charter-party is in general of that kind which lawyers call recip-

> rocal, that is, mutually obligatory upon each party; nevertheless, the parties may by particular clauses render it obligatory upon one, and optional to the other * * *
>
> The author thereupon cites a case, in which the proviso was: 'That if the said ship should not have arrived at Wingaw aforesaid by the 1st day of March next ensuing, *then and in such case it should be in the option of the merchant either to load the said ship or not.*'
>
> An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed." (*Abbott, Shipping,* 14th Ed. pp. 417, 418, 423)

Parsons, Maritime Law, Book I, p. 272, sums up the proposition, "as applied to contracts relating to shipping:"

> "Indeed, it may almost be said, that there is a *presumption of law, for there is certainly a strong disposition of the courts, against such a construction of a covenant or promise as would make it a condition precedent.*"

It should be noted, therefore, that a principle of construction which might be suitable to a common law case on *sales* has no application to a contract relating to *shipping.*

If the *particular time* when the Cacique should be ready had been intended as a substantial part of the contract, the parties would have stressed this feature by a proviso in the nature of a cancellation clause. In the instant case the *agency or instrumentality* by which the shipment was to be made is stressed, as indicated by the words *"ship-*

ment per". The *time* of the shipment is not only *not* made specific, but left expressly indefinite in two ways: first, by giving parties a margin as to "the exact loading date", and second, by giving respondent another margin for the delivery of the cargo by providing that it need not be delivered on any specified day, but that respondent could extend the time for delivery by paying an agreed sum per day.

The *prima facie* effect of the language used in the contract is, therefore, that the parties did *not* intend to make the exact time of the shipment a substantial requirement.

b. The circumstances surrounding the contract.

Even if the prima facie effect were in favor of the construction on which respondent relies,

> "The subject-matter of the contract, its purpose, and *the situation of the parties*, are material to determine their intention and the meaning of words used. When these are ascertained, *they must prevail over the dry words used.*"
>
> *Hull Coal Co. v. Empire Coal Co.* 113 Fed. 256, 260 (C. C. A., 4th Circ.)

What was the situation of the parties? It is shown by the testimony of Mr. Moore, Mr. Carter, and Mr. Davis, the three parties who negotiated for and made the contract in February.

Mr. Moore, Traffic Manager for libelant at the time, testified substantially:

Mr. Davis, for the Ford Motor Company, called on him about the freighting of 6200 measurement tons of automobiles to New Zealand and Australia. There was then a scarcity of tonnage due to the European war; but libelant told respondent's agent, Mr. Davis, that the steamer Cacique might be appropriate for the shipment; that the Cacique was then on a voyage from the Atlantic to San Francisco and would stop on the way to take on a cargo for Vladivostok; that she would then arrive at San Francisco and discharge her cargo, would load cargo at San Francisco for Vladivostok, then would proceed to Vladivostok and discharge her cargo there; then load at Vladivostok, and one or more Oriental ports for the return voyage to San Francisco; that, after her return voyage to San Francisco (this being then her *second prospective* arrival there) she could be made ready for this automobile cargo. (115-121)

> "I told Mr. Davis that she would be due in San Francisco for late March loading for Vladivostok, and that, given a favorable voyage, her *probable* date for returning for loading at San Francisco for these automobiles would be some time in June." (122)
>
> "They had been trying very hard to find space for this particular lot of freight, and that they would very much appreciate anything which could be done by us to move it from San Francisco *within a reasonable time after it arrived here.*" (123)
>
> *"As a matter of fact, it would be impossible at that time, with the vessel's commitments*

ahead of her, to guarantee that she would arrive here in June.'' (123)

"The COURT: Q. Did you tell Mr. Davis that, that it would be impossible to figure definitely? A. Yes." (124)

"Nobody would be in a position to make a positive statement about the date of arrival here or elsewhere of a tramp steamer of that character." (149)

"Q. In those conversations between you and Mr. Davis, was anything said at all about June loading? A. Probable June loading." (Cross-ex. 151)

"A. The understanding was that the cargo was to be lifted when the Cacique returned from Vladivostok, and *we designated that voyage as her June loading in San Francisco, to distinguish it from her March-April loading, when she left for Vladivostok.''* (152)

Mr. Carter, Assistant Manager for libelant at the time when the contract was made, testified substantially:

"He (Davis) wanted to know, if it was not possible for us to divert one of our steamers from the regular trade, in order to take care of this business for them, to carry this cargo from San Francisco to Australia." (183)

"A. He wanted a steamer capable of carrying the entire amount of 6200 tons, and was particularly anxious that the steamer *should not be too early.*

Q. Did he give any reason why he did not wish the steamer too early?

A. They were crowded in getting out automobiles at their factory; the discussion at that time was the possibility of this cargo not being ready in case a vessel made early June." (184)

Mr. Davis, who, as head of the Traffic Department of Ford Motor Company of San Francisco, made the contract with libelant on behalf of respondent, was called as a witness for respondent and testified as follows:

> "There was a map on Mr. Moore's wall, in his office, which had all the ships on it, of their company, and the location of each, and on this map these ships were moved from day to day, scheduled, more for his information, so that he could *presumably tell* where the ships would be or destined. But there was nothing definite, as I remember, arranged upon that day, that, first meeting." (326)
>
> "We were looking over the map, and it seemed that the Cacique was about the only boat that we could *figure* on which would arrive here for June sailing. As I recall, she was then on her way from the East Coast to this port, and then for Vladivostok, and *her round trip would bring her back into this port about June.*"

On cross-examination this witness stated that he had a conversation with counsel for libelant, in the presence of Mr. Moore and Mr. Florentine, at which the following occurred:

> "Q. Mr. Davis, do you remember that you told me in the presence of Mr. Moore and Mr. Florentine on that occasion that there was one feature that you remembered distinctly, namely, *that no exact time for the arrival of the Cacique was intended to be stipulated,* on the ground that *it was impossible, so long ahead, for any steamship man to fix any time?*
>
> A. For the arrival of the steamer?
>
> Q. Yes. A. *I believe I did.*" (333)

"Q. Do you remember that you yourself, suggested that since you knew that two voyages would intervene between the 25th of February and the expected arrival of the Cacique, that a great many things might happen to steamers on voyages, and, therefore, it would have been impossible to state when that steamer would arrive in San Francisco, that it could only be approximate?

A. I remember something about stating that there might be many things happen to a steamer while it was in transit." (334)

"Q. Don't you remember that you said that no steamship man could possibly foretell four months ahead the time of arrival of a steamer at any particular time, and that for that reason it was not intended to make any contract for her arrival on any particular date?

A. I don't remember of making such a broad statement as that, about being a steamship man." (334)

Mr. Florentine testified:

"As I remember it, he said exactly * * * that he did not think that any steamship man would be in a position to definitely fix a date for the arrival of any vessel four months ahead, particularly in view of the voyage the vessel had to make." (357)

Another significant circumstance which leads to the same result, viz.: that it was *not* intended by respondent to secure the benefit of a warranty that the Cacique should make a June loading, is the following:

Assuming that respondent *had* intended such a warranty, it would certainly have impressed its importance upon its San Francisco agent in letters

or telegrams defining his authority or instructions. The existence of such communications would be a certainty, *if* the intention to secure a warranty had existed. How easy it would have been for respondent to remove all doubt from this fundamental proposition by producing such letters or telegrams sua sponte! Indeed, if the intention of respondent *had* been in conformity with its present claim, it would have been anxious and eager to introduce in evidence respondent's instructions to Mr. Davis showing that a substantial limitation of his authority to make the contract was that the time for the loading of the Cacique should be fixed definitely and absolutely. But what occurred at the trial? Not only did respondent not produce sua sponte the evidence which would have thrown light upon the question, but, when libelant, to ascertain the truth, took the chance of hurting its personal interest and called for the production of the letters and telegrams containing Mr. Davis' instructions, libelant was met with the astonishing information that the records of Mr. Davis' office had been destroyed between the time of the making of the contract and the time of the trial, "so I cannot produce what they have destroyed, but I have a letter here that was given to me in 1916." (179) The instructions from respondent to Davis would have disclosed, *either,* that it made no difference to respondent, whether the Cacique would load in June or later; *or,* that he *must* make a contract containing a warranty that the Cacique should load in

June. The inference which it is legal to draw from the non-production of the evidence is, that the instructions would have shown that it made no difference to respondent whether the Cacique was loaded in June or July.

The circumstances surrounding the making of the contract show therefore, both directly and by inference, that it was *not* in fact intended by the parties to make a contract fixing the prospective loading of the Cacique at any definite time.

It is also proper to consider that, in the very nature of things, no experienced shipowner would have tied up a large and valuable freight carrier in the busy days when this contract was made, by a one-sided engagement which the merchant, at his option, could cancel after the vessel had arrived at the loading place.

c. The practical construction given to the contract by the respondent after it was made.

Three days after the making of the contract (February 28th) respondent wired to Mr. Davis:

> "We need about 4000 tons in addition to ten thousand arranged, *say for late June early July sailing.*" (269)

This indicates that it was not the practice of respondent to make the exact time of loading a condition or warranty in its freighting contracts.

On March 2nd respondent wired:

> "Understand you have arranged 6200 tons * * * this is all we will *need to end of July.*" (269)

On March 3rd respondent wires:

> "We need only about 6000 tons in addition to what we arranged and would like this *for June-July sailing.*" (270)

On March 4th Mr. Davis wrote to respondent:

> "From subsequent wires it would seem that you have all the space required up to *June and July* and will need no more until *late July or early August.*" (271)

These communications show that respondent's freight engagements were customarily made so as to prevent the fixing of an exact time limit for loading; for indeed, it was the interest of respondent *not* to bind itself to a delivery of its goods to vessels at San Francisco on a fixed date. The uncertainty of the time required for railroad transportation of huge shipments from the factory to the distant loading port was only one of the decisive reasons why respondent would naturally have avoided a definite time obligation.

On March 28th respondent wired to Mr. Davis:

> "You state 6200 tons * * * We will be able to give 4284 tons * * * Do not reserve any more space *until July;* (272)

indicating that respondent expected to have automobiles ready for July shipment to Australia, but that, if it was tied down to a June shipment, it could not furnish to the Cacique the tonnage contracted for, but only about two-thirds thereof. It *could* fulfill its contract, if a *July* loading was made, but not if an earlier shipment was required.

Mr. Davis receives this information "with considerable surprise" (274); he feels "that when it is taken up with them, they will desire to cancel our contract entirely." (274)

Thereafter many expectations were entertained and attempts made to make up the shortage in the cargo.

On April 4th respondent "expects certain additions from Australia which will no doubt bring our specifications up to the required amount." (276)

In an endeavor to make up the deficiency, respondent made a contract on May 5th with Henry W. Peabody, for 542 tons of automobiles to supply part of the Cacique cargo. In that contract the Cacique is described as "loading at San Francisco *about July 1st*". Is not this a conclusive admission that, according to its own construction, a *"loading about July 1st"* satisfies the contract with libelant? Would not a loading on the 1st, 2nd, 3rd, or 4th of July have satisfied the Peabody contract? Is this consistent with the contention that a loading after June was a breach of a warranty of the contract in suit?

That "June *or early July*" loading was considered by libelant and respondent as a compliance with the contract is also confirmed by the letter of the Southern Pacific Company accompanying some railroad shipments, copies of which were sent to

both libelant and respondent, and which read: "All for the S. S. Cacique *June or early July.*" (175)

On May 27th Davis informed respondent that the Cacique would sail *about July 10th.* On the same day he wrote to respondent: "We intend to go on and secure cargo if it is possible." He was the party who made the contract. He understands on May 27th that the contract is valid, although the Cacique would sail about July 10th.

On May 31st Davis advises, with reference to the attempt to persuade the Union Steamship Company to release some cars of automobiles for application to the Cacique contract, that the said company refuses to do so, but that "any cars here *after July 1st* they will give to Grace". (294) Is this not again an admission that, according to the understanding of Mr. Davis, cars arriving after July 1st do comply with the contract?

On May 31st respondent wrote, after having been advised that "Cacique will sail about July 10th" (291):

> "It is a further *surprise* to us to note that up until Saturday last we were still led to believe that the Cacique would sail on the 14th of June. This *was* the latest information from you. We had to do considerable wiring to get any different information.
>
> This is not in the nature of a complaint, but indicating only the handicap such lack of information places us under at this end. *This information relayed to Australia some time ago would have allayed* a considerable fear on their part that shipments would arrive piling up

> one on the other causing congestions to a considerable degree." (295)

This date (May 31st) is an important date in the evolution of this case. Before this time respondent had been sweating blood because the Cacique would be ready *sooner* (June 14th) than respondent could possibly be ready with its cargo. Now respondent has learned that she would not be ready until nearly a month later (July 10th) and respondent draws a deep sigh of relief, because the fear of the Australian customers would be allayed. A *late,* a July shipment and sailing is what respondent desires on May 31st, and it welcomes information to the effect that the Cacique would not arrive as early as she had been expected to arrive. (Incidentally this evidence shows also the falseness of the allegation in respondent's answer: that respondent had "sold a large quantity of automobiles for delivery in New Zealand and Australia, *actual* shipment of which by water was *required* to be made during the month of June". (35) It is upon this flimsy and untrue assertion that respondent founds the necessity for a "June loading" warranty in the contract.)

The turning point in the evolution of respondent's theories comes in the first part of June. As late as June 1st Mr. Davis writes to respondent:

> "However, they (Union Steamship Company) are willing to allow us to have any cars *which might arrive later than July 1st* * * * which we can turn over to Grace & Co. for the Cacique." (297)

On June 1st therefore, the maker of the contract still thinks *that cars arriving from the East later than July 1st would satisfy the contract,* and respondent continues to work on this theory with possible suppliers of the deficiency in the cargo.

As late as June 3rd respondent wires to Davis, referring to invoices and bills of lading covering automobiles:

> "which we expect to go forward on the following steamers: Coolgardie June 3d Waimarino June 30th. *Cacique July* 12th." (309)

On June 13th Mr. Davis wrote to respondent:

> "Regarding the change of dates Cacique sailing, information has come to us which had not previously been made public to the effect that the Cacique had met with an accident after leaving Vladivostok, Russia, which necessitated repairs, and again it was necessary to put her on the ways at Hong Kong which further delayed the boat and we were only recently informed of this change, although the movements of the boat had led us to believe that it would be much later than the middle of June for her departure, and *it is now our hope that she will even be as late as the tenth of July* as we wired recently." * * * "We sincerely hope that you will be able to fill the space with your own cars rather than let it go to any other concern for a lower figure." (308, 309)

When the prospects of supplying 6200 tons became desperate, Mr. Davis, on June 8th, makes a discovery and wires to respondent:

> "Our contract reads June loading. *Does not their failure to complete loading our cars in June automatically cancel contract?* That is opinion here. Unless you intend reshipping Normandy cargo we think best to stand firm on June loading." (299)

The idea is: If the Cacique arrives too early for your purposes, stand firm on the point that the contract calls for an earlier loading. Incidentally this would have the advantage of getting rid of a contract which, from the beginning, did not appeal to the Eastern principals, as they could have secured cheaper rates with other lines. "The rates are going down" (394) The Union Steamship Company had refused to give up the 1500 tons required by respondent for its Cacique contract. Respondent had not the cargo to fill the engaged space; it could not fill it by other shippers' cargo without suffering loss. A threatened congestion of cars in Australia was another difficulty confronting respondent; it became apparently necessary to cut down even the 4075 tons on hand. These difficulties were multiplied and increased by the prospect of a too early arrival of the Cacique. They could be healed only be a sufficiently late arrival of the Cacique. When she, in fact, arrived too soon for respondent's convenience, the discovery of a method of salvation became a necessity. This accounts for respondent's sudden change of front. Why, it was so easy! And now the contract is "automatically cancelled" on the *pretended ground that the Cacique was too late, when the real ground*

was, that she was too early. The "June loading" theory was, indeed, an eleventh hour escape from a difficulty. The inventor of the theory had, apparently, some scruples about his suggested remedy; for he recommends it only as an extremity, viz.: "unless you intend reshipping Normandy cargo". Mr. Davis feels that it *would* have been nicer to reship this last cargo on the Cacique and to avoid the breach of a contract made. (Incidentally the reshipping of the Normandy cargo suggests, again the shipping on the Cacique of a cargo, which could not possibly arrive until after July 1st, so that the effect of the suggestion is: Unless you are in position to ship *after* July 1st, cancel the contract on the ground that the steamer should have arrived in time to load *before* July 1st.)

This is quite in line with respondent's notice to libelant that

> "*if* our plans for supplying 6200 tons for this vessel do not carry through, *we do not consider our obligation binding.*" (49)

"*Our obligation*" was, to supply 6200 tons for this vessel. It is binding (respondent says), *if* our plans for supplying the 6200 tons carry through. but we do *not* consider it binding, if our plans do *not* carry through. Verily, Mr. Pecksniff had, by this time, degenerated into a bold and desperate commercial buccaneer. Indeed!

> "I will acknowledge my obligation, if it suits me to perform it; but I will not consider it binding, if my plans for performing it miscarry!"

When the case had reached this stage, it passed into the hands of the legal advisers. Of course no lawyer could for a moment recognize the validity of the naive layman's excuse for not considering his obligation binding, and it became necessary to find the "legal excuse". This accounts for the birth of the theory that *time* was of the essence of this contract; that the Cacique had missed her time in June, and that, consequently, this respondent could, properly, in the eleventh hour, discontinue the performance of a contract which, by its previous conduct, it had often admitted to be as binding in July as well as in June. It is, of course to be presumed that the legal advisers did not, at the time of the creation of the "June loading" excuse, know that respondent, by its previous correspondence and conduct, had given a construction to its contract which is bound to embarrass the "legal excuse."

d. The time of delivery provided in the contract proves that time of loading was not intended to be of the essence.

The contract provides:

> "*Delivery*: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage."

There is no stipulation here, that delivery of the cargo, by respondent, should be in *June*. The only stipulation is that it shall be "*delivered as fast as vessel can load.*" Even if respondent should not

deliver "as fast as vessel can load", the penalty provided is not, that the contract should be automatically terminated, or even that libelant should, in that event, have an option to cancel it. On the contrary, if respondent should not deliver "as fast as vessel can load," it is stipulated that the shipper should pay demurrage at a fixed rate per day: if he delayed the vessel one day, $3000; if he delayed her two days, $6000, etc. The shipper could buy the right to delay her. He had the *right* to keep her waiting for cargo so that her loading might not be completed on July 1st.

Is such a contract consistent with a contention that the contract is "automatically cancelled" with the beginning of the first day of July?

IV. THIS ACTION SHOULD BE SUSTAINED, EVEN ASSUMING THAT IT WAS PREMATURELY BROUGHT.

The District Court held that the libel did not sustain an anticipatory breach on June 27th, when the libel was filed. The facts show that, on that day, there had been a succession of anticipatory breaches, which had its climax in the notice received from the Southern Pacific Company in the forenoon of June 27th that "none of the cargo at present on hand booked steamer Cacique" would be delivered, and we therefore contend that the court's ruling is erroneous.

We furthermore submit that, granting for the moment that the libel was prematurely filed, and

that facts occurring *after* the libel would sustain the allegations of the libel, the effect of such a condition would be that, in admiralty practice, the libel should be sustained. The District Court recognizes this rule of admiralty, but apparently holds that, in this case, an *exception* to the admiralty rule should be made for reasons stated as follows:

> "Where, as here, performance was not due at the time the action was commenced, where performance of at least a substantial portion of the contract was offered by respondent, and where there is a grave question, whether libelant itself was or would be in a position to carry out its portion of the contract, however willing to do so."

We submit that these reasons are all founded upon erroneous assumptions and are, therefore, not valid.

That "performance was not due at the time the action was commenced" is not a peculiar feature of this case, if it be viewed as being founded upon an anticipatory breach; on the contrary, performance is usually not due, in cases of anticipatory breach, when the action is commenced. Furthermore, the performance which was "not due at the time the action was commenced" can only refer to the performance by libelant; as to performance by respondent, it had been long due and was so recognized by respondent, when it prepared part of the contracted cargo in May and sent it over the railroads to San Francisco in June. Not only was it due, but unequivocal notice had been given by

respondent that it was only a part performance which must be accepted by libelant as a complete performance. The complete performance was due and overdue, and respondent had positively renounced full performance of the contract, while, at the same time, libelant refused to accept the part performance as a compliance with the contract.

The second reason, viz. that "performance of at least a substantial portion of the contract was offered by respondent" is equally insufficient to take the instant case out of the usual rules of admiralty. At best the offer to perform a substantial part of a contract is *not* a performance of the contract; but surely the facts of this case do not recommend respondent to such tender consideration of a court as should result in resolving a question of discretion in its favor. Respondent informed libelant, with whom it had made a contract:

> "I will not do what I contracted to do, but I will do part of it, provided you release me from the rest of my obligations; and if you do not like this, I will not fulfill any of my obligations."

Such an act should not recommend respondent to the favorable consideration of the court.

The third reason, viz. that "there is a grave question, whether libelant itself was or would be in a position to carry out its portion of the contract" stands on not better a foundation. Libelant had, at the time of the filing of the libel, nothing to perform except to make the Cacique ready for the

loading under this contract. Whether or not libelant has done this, may be granted to be "a grave question." The answer to this question depends upon the construction of this contract—a subject which we have treated in this Brief. If it is a grave question, it should be decided by the court. We believe that this court will agree with us that libelant *was* in a position to carry out its portion of the contract. But if it be assumed that it was not, the result of such inability might constitute an independent ground for dismissing the libel, but it would not be a sufficient ground for holding that if this action was prematurely brought, libelant should not receive the benefit of the admiralty rule applying to such actions.

The colloquy between the court and libelant's counsel, referred to in the opinion of the court, ended in the admission by counsel: "I will rest on the breaches down to the time of the filing of the libel." (454) We realize that counsel, confident that libelant's case was sufficient without the benefit of the application of the liberal admiralty rule, waived a right which, as after-events proved, might have been of value to his client's cause. We still believe that the facts shown before the filing of the libel were abundantly sufficient to support a cause of either actual or anticipatory breach of contract against respondent. If, however, this court should require the weight of any facts which occurred after the filing of the libel, for the purpose of sustaining the libel, libelant hereby with-

draws, for the purposes of this trial de novo, the admission or waiver contained in the colloquy and claims the full benefit of the liberal admiralty rule.

It is "the settled law as to the effect of appeals in admiralty" that an appeal vacates altogether the decree of the District Court, and that the case is tried de novo in the Circuit Court of Appeals.

Duche v. John Twohy, Adv. Op. 1920-21; p. 388.

This rule is applied even to the extent that a cause need not be sent back to the District Court to take new testimony, but evidence can be taken in the Circuit Court of Appeals.

The St. Johns, N. F. 272 Fed. 673.

It follows from this that this court may consider testimony, the benefit of which was waived by a party in the lower court, and that this court may use, if necessary, any facts appearing in evidence which will sustain the libel on a theory of either actual or anticipatory breach, even though the facts occurred after the filing of the libel.

It would be immaterial even if a theory which the libel is wide enough to cover had never been thought of when libelant pleaded.

Bashinsky Cotton Co. v. Sunset Lighterage Corp., 272 Fed. 120.

It is respectfully submitted that the decree of the District Court—based as it is upon technicalities

for which there is no room in admiralty practice—should be reversed, and that a decree should be ordered in favor of libelant upon the merits of the cause as the evidence shows therein.

Dated, San Francisco,
October 5, 1921.

ANDROS & HENGSTLER,
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